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(2014) 21 CCLJ 232

Putting the 'personal' back into injuries: An interpretation of Pt 3-5 of the Australian Consumer Law

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There is an ongoing debate in relation to Pt 3-5 of the ACL, particularly over its use in relation to other civil liability remedies. This article looks more closely at ss 138 and 139. It argues that, because of a possible design flaw in the statutory construction of s 138, it can be interpreted much more broadly than it has been to date. Also, the article discusses the effect on an interpretation of s 139 of the ACL of both the High Court's decision in ***Marks v GIO Australia Holdings Ltd****, and a small but significant amendment to s 139 when the ACL was enacted. It argues that s 139 can now be interpreted broadly to include claims not just for loss of financial support or services but for all loss or damage or injury caused.*

1 Introduction

There is an ongoing debate about the effect of Pt 3-5 of the Australian Consumer Law (ACL) (formerly Pt VA of the Trade Practices Act 1974 (Cth) (TPA)). To date, the debate has centred on the effect of its inclusion in the pantheon of civil liability legislation available to injured plaintiffs in Australia.[1] Part 3-5 of the ACL -- Liability of Manufacturers for Goods with Safety Defects -- makes manufacturers liable to compensate parties who have suffered loss or damage caused by the manufacturer's defective goods. Among other things, a plaintiff can claim against a manufacturer if they suffer injuries because of a safety defect in the goods supplied by the manufacturer (s 138); or loss or damage because of injuries suffered by another person (the injuries referred to in s 138) (s 139).

In this article, I argue, as a matter of statutory construction, and consistently with High Court authority that because of first, the use of the word 'injuries' and not 'injury' or 'personal injury' in s 138 of the ACL; and second, the change from the word 'loss' in the former TPA s 75AE to 'loss or damage' in ACL s 139, ss 138 and 139 cover a far broader range of loss and damage than has been claimed under them to date. I explore this issue by considering the genesis of the undefined term 'injuries' used in Pt 3-5 of the ACL and contrasting it with the use of the word 'injury' in other parts of the ACL and the clear definition of the term 'personal injury' in the Competition and Consumer Act 2010 (Cth) (CCA). First, I explore why the word 'injuries' is used in ss 138 and 139 of the ACL as opposed to 'injury' or 'personal injury'. I argue that if 'injuries' is interpreted considering the purpose and using the context of s 138 within Pt 3-5 of the ACL, it takes on a much broader meaning than mere personal injury. Second, I consider the High Court's interpretation of 'injury' as implied into the term 'loss or damage' by s 4K of the TPA (and s 13 of the ACL) in *Marks v GIO Australia Holdings Ltd*[2] and the implications of that interpretation on claims under s 139.

By way of example to demonstrate the way s 75AD of the TPA (s 138 of the ACL) has been used to date, if a person was mowing his or her lawn, the mower exploded because of a safety defect in the mower and the person suffered injuries because of the safety defect, he or she was able to sue the mower manufacturer under s 75AD for any loss suffered because of the 'injuries'.[3] To date, claims under s 75AD (and s 138) have been confined to claims for personal injuries. I challenge that limitation in this article by arguing for an expanded interpretation of the term 'injuries'.

To clarify the way that s 75AE TPA (s 139 of the ACL) has been interpreted, and continuing the mowing example, assume the person who suffered the injuries because of the defective mower was incapacitated for weeks or months after the incident. Assume also that a third person was dependent on the injured person's financial support or for services provided by them. Under s 75AE of the TPA, that third person could have sued the manufacturer for the loss of that financial support or loss of services.[4] Since the introduction of the ACL, s 139 ACL now allows a dependent person to claim for 'loss or damage' so suffered. The confluence of this seemingly innocent amendment, which was justified on the basis of consistency in drafting style[5], and the High Court's interpretation of 'loss or damage' in *Marks* has potentially enormous ramifications for the effect of s 139.

On 1 January 2011, Pt VA of the TPA was re-enacted as Pt 3-5 of the ACL. The ACL is Sch 2 to the CCA and derives its power as a law of the Commonwealth from Pt XI of the CCA. When the ACL commenced, ss 75AD and 75AE of the TPA were replaced by ss 138 and 139 of the ACL. The ACL sections are not replicas of the former TPA sections but were said to be amended 'to reflect the drafting style used for other provisions of the ACL'.[6] However, the drafters maintained the use of the word 'injuries' in ss 138 and 139 and amended the word 'loss' in s 139 for stylistic effect. The consequence of those decisions could be far reaching as I emphasise in this article. To understand their effect, it is necessary to begin with a short history of the sections.

2 Background

2.1 History of s 75AD of the TPA and s 138 of the ACL

On 9 July 1992, Pt VA -- Liability of Manufacturers and Importers for Defective Goods -- was inserted into the TPA to provide a statutory civil liability scheme to allow individuals to claim against manufacturers for loss caused by defective goods.[7] This statutory liability was designed to eliminate the need for injured parties to sue in negligence. Despite this, claims under Pt VA and its ACL successor, Pt 3-5, have been rare.

Part VA was based on the 1985 European Community Product Liability Directive[8] (EC Directive) which was, at the time, touted as 'the emerging international standard for product liability legislation'.[9] In the second-reading speech for the introduction of the Trade Practices Amendment Bill 1992, Senator Tate stated that the Bill 'followed the EC Directive in all important respects'.[10] Paragraph 28 of the Explanatory Memorandum to the Bill states that 'the Government's intention in introducing this regime is that Australian consumers who are *injured* by defective goods should be placed in a position which is no less advantageous than that enjoyed generally by their European counterparts in the same situation'.[11] Article 1 of the EC Directive stated simply that 'the producer shall be liable for damage caused by a defect in his product'. Article 9 then defined 'damage' relevantly as 'damage caused by death or by *personal injuries*' (emphasis added). However, when enacted in 1992, s 75AD of the TPA stated relevantly:

> If:
>
> (a) a corporation, in trade or commerce, supplies goods manufactured by it; and
> (b) they have a defect; and
> (c) because of the defect, an individual suffers *injuries*; [emphasis added]
> then:
> (d) the corporation is liable to compensate the individual for the amount of the individual's loss suffered as a result of the injuries; and
> (e) the individual may recover that amount by action against the corporation; ...

Somewhere in the translation of the EC Directive to the TPA the word 'personal' was removed and since it was enacted in 1992, s 75AD (and subsequently s 138 of the ACL) has referred only to 'injuries' suffered by an individual. The plural word 'injuries' is not used anywhere else and neither is it separately defined in the ACL or the CCA. We are left to ask, was the failure to include the word 'personal' a draftsperson's error, or was the word 'personal' deliberately excised so that Pt VA would apply more broadly than to mere personal injury? Such a broad interpretation would be consistent with the stated intention of the Parliament to compensate 'injured' consumers -- not those merely suffering personal injury. I argue that this curious use of 'injuries' in the TPA instead of the 'personal injuries' referred to in the EC Directive has several implications which are discussed in detail in this article.

Since the ACL commenced in 2011, s 138 of the ACL now states relevantly:

> 1 A manufacturer of goods is liable to compensate an individual if:
>
> (a) the manufacturer supplies the goods in trade or commerce; and
> (b) the goods have a safety defect; and
> (c) the individual suffers *injuries* because of the safety defect. [emphasis added]
>
> 2 The individual may recover, by action against the manufacturer, the amount of the loss or damage suffered by the individual.

In part 3 of this article, I consider whether the ordinary use of the word 'injuries' allows a clear and unambiguous interpretation of s 138 on its face. I do this by juxtaposing its use with, first, the use of the singular 'injury' in the same

Chapter of the ACL and, second, its use in relation to the term 'personal injury' which is clearly defined in other parts of the CCA.[12] After considering that we do need to interpret the section further, in part 4, I apply the fundamental principles of statutory interpretation to s 138 to determine whether we can derive an interpretation of the section that is consistent with the purpose and in the context of Pt 3-5 of the ACL. In part 5, I consider the case law to determine whether the argument I make might be precluded by precedent. In part 6, I discuss the increased reach of s 139 ACL since its amendment when the ACL was enacted in 2011.

Firstly though, by way of background, I synthesise the state of the academic argument in relation to ss 75AD and 75AE. This background forms part of the later statutory interpretation exercise that argues for a broader interpretation of the sections.

2.2 The state of the argument

The discussion in the literature to date revolves around Pt VA (Pt 3-5 of the ACL) as a part of a much broader civil liability regime in Australia today and largely ignores a close analysis of 'injuries'. For example, Harland discusses the elements of what he terms 'personal injury' claims under Pt VA of the TPA[13] without delving into whether the Part should be so limited. He discusses the elements necessary for a claim under Pt VA which include 'goods', 'manufacturer' and whether the goods are 'defective'.[14] However his analysis of 'injuries' is limited and peripheral.[15] Similarly, Kellam and Nottage argue that Australia's product liability for defective goods regime has become a 'legal morass'[16] but, in their discussion of Pt VA, do not consider the element of injuries in any depth. It seems to be assumed that 'injuries' means 'personal injuries'. Indeed, Kellam, Clark and Glavac specifically assume so.[17] To the author's knowledge, this article is the first time that anyone has examined the use of the word 'injuries' in s 138 in detail.

Courts also have discussed the elements of ss 75AD and 75AE (ss 138 and 139 of the ACL) without dwelling on the definition of 'injuries' necessary to satisfy the sections. For example, Lindgren J in *Cook v Pasminco Ltd*[18] discussed the elements of s 75AD as 'goods', 'manufactured', 'supplied', 'in trade or commerce' and 'defect' without discussing the 'injuries' suffered by the plaintiffs.[19] His honour decided the matter without the need to consider whether the injuries suffered by the plaintiffs were sufficient to meet that element of the section.[20] In *Graham Barclay Oysters v Ryan*,[21] while there was some discussion of the deleterious effects of hepatitis A on the human body, Lindgren J again, did not discuss whether hepatitis A constituted 'injuries' necessary to satisfy s 75AD.[22] The emphasis in this case was the defence available to Graham Barclay Oysters under s 75AK of the TPA. Implicit in the reasoning in *Pasminco* and *Graham Barclay* is the conclusion that the personal injuries referred to in those cases clearly fall within the scope of the word 'injuries' used in Pt VA of the TPA. I argue below, that a much broader interpretation of 'injuries' is available and plaintiffs and courts have yet to test the outer limits of its meaning. On this basis I argue that there is no conflicting precedent that would preclude the broader interpretation for which I contend. To do this, I interpret the sections using the tenets of statutory interpretation set out in the Acts Interpretation Act 1901 (Cth) and review the cases that have considered claims under Pt VA of the TPA and Pt 3-5 of the ACL.

3 Statutory Interpretation

3.1 Is 'injuries' synonymous with 'injury'?

The word 'injury' is used without the adjective 'personal' in relatively few substantive sections of the CCA and the ACL. Like 'injuries', it is not a term that is separately defined in either the CCA or the ACL. Relevantly, it is used throughout Pt 3-3 of the ACL -- Safety of Consumer Goods and Product Related Services -- which deals with safety standards for and bans and recalls of certain goods that might cause injury (or the defined term -- 'serious injury or illness') -- particularly to consumers. The use of the term 'injury' in these sections (while not defined) is clearly directed to what might well be categorised as instances of 'personal injury'. For example, under s 104(2), the Commonwealth Minister is required to publish a safety standard to prevent or reduce the risk of 'injury' to any person. Further, under ss 109 or 114, a responsible Minister is required to impose an interim or permanent ban on particular consumer goods if they would or may cause 'injury' to any person. These sections are clearly directed at situations threatening immediate danger to the health or safety of individuals. The use of the word 'injury' in these sections more readily equates to 'personal injury' and the sections could easily be amended to make that clearer. However, a fuller discussion of this idea is outside the confines of this article. The point that can be made is that 'injury' as used in these sections equates more readily to what we consider to be 'personal injury' and can be juxtaposed with the term 'injuries' as used in ss 138 and 139.

The starting point to clarify whether 'injuries' means the same thing as 'injury' or not must be s 23 of the Acts Interpretation Act 1901 (Cth) which states that '[i]n any Act, words in the singular number include the plural and words in the plural number include the singular'. However, in *Pritchard v Racecage Pty Ltd*,[23] counsel for the respondent sought to differentiate 'injuries' in Pt VA of the TPA from the use of the word 'injury' in s 4K of the Act. In discussing this, Branson J agreed that 'it cannot necessarily be assumed that "injury" and "injuries" mean the same thing' but her honour did not discuss the matter further. Pearce and Geddes state, 'where a legislature could have used the same word but chose to use a different word, the intention was to change the meaning'.[24] Of course in longer Acts that have subsequent amendments such as the CCA, this presumption may be rebutted. But the history of amendments to Pt VA of the TPA and especially the CCA amendments made as recently as 2011 which have not amended the word 'injuries', must further entrench the presumption in this case that 'injuries' and 'injury' are meant to mean different things. Then, we ask, what 'other' is it supposed to mean?

3.2 Is 'injuries' synonymous with 'personal injury'?

The term 'personal injury' used to distinguish injury to the person from other broader forms of injury (for example, its legal use as 'an actionable wrong') has been in common law and statutory parlance at least since 1935.[25] It was therefore not a new or unfamiliar term when Pt VA was inserted into the TPA in 1992. It is defined both in s 4 and s 130 of the CCA to include:

> (a) prenatal injury; and
> (b) impairment of a person's physical or mental condition; and
> (c) disease;
>
> but does not include an impairment of a person's mental condition unless the impairment consists of a recognised psychiatric illness.[26]

This modern definition of personal injury is now familiar and is similar to that used in the various state Civil Liability Acts such as in s 5 of the Civil Liability Act 2002 (NSW). As discussed though, the definitions in ss 4 and 130 of the CCA do not apply to the ACL.[27] Again, if we have a clear definition of 'personal injury' in ss 4 and 130 of the CCA proper and Parliament has chosen not to amend 'injuries' to 'personal injury' in s 138, particularly given the most recent and far reaching amendment to the Act in its 40 year history, one is left to assume that Parliament intended 'injuries' to mean something other than personal injury.

But, if the academic literature and the courts have interpreted the section to apply to personal injury, how then are we to reconcile this tension? Reviewing the extrinsic material used by Parliament to explain the sections may help but we should not immediately leap to the extrinsic material. We must first see what falls from applying the rules of statutory interpretation to ss 138 and 139 in turn.

4 Statutory interpretation

4.1 Legal words

There are obviously a range of meanings of the word 'injury'. But the word injury (and for argument's sake, injuries) has taken on a legal meaning. The word connotes a wrong of some kind that is actionable in law. Where words have taken on such a legal meaning, they are to be construed as having that legal meaning.[28] There is no indication from the ACL that 'injuries' should be given any but its legal meaning. The object then must be to look for the meaning best suited to the ACL.

In *Marks*, Gummow J was prepared to allow a broad interpretation of 'injury' as used in s 4K of the TPA based upon an analysis of the common law usage of the term to mean an actionable wrong.[29] If we read s 138 using the legal meaning of 'injuries' as an actionable wrong, the reach of s 138 is immediately expanded so that an individual may recover, by action against the manufacturer, the amount of the loss or damage suffered by the individual because of any [actionable wrong] suffered by the individual caused by the safety defect in the manufacturer's goods. Read in this way, the section is no longer limited to claims for 'personal injury'. This interpretation is further confirmed when we consider the purpose of the ACL, particularly, Pt 3-5.

4.2 Purposive approach

Section 15AA of the Acts Interpretation Act 1901 (Cth) requires that:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

According to Pearce and Geddes, if we consider the purpose or object of the Act as a whole, 'an alternative interpretation of the words may become apparent'.[30] There is no purpose provision in the ACL. The object of the CCA is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[31] This broad object gives us broad remit to interpret its various sections.

However, Pt 3-5 of the ACL is a self-contained Part within Ch 3 of the ACL. In those circumstances it is acceptable to derive the scope of the section from the purpose of the self-contained Part.[32] The long title of the Trade Practices Amendment Act 1992 (Cth) (1992 Amending Act) which inserted Pt VA into the TPA was 'An Act to amend the Trade Practices Act 1974 to provide for the compensation of persons who suffer *loss* caused by defective goods, and for related purposes' (emphasis added). If we consider s 138 in isolation with that purpose in mind, the interpretation that would 'best achieve the purpose or object of the Act' is one that would compensate a person for the loss they suffered. There is no limitation on the word loss. It is not confined, for example, to loss in the form of personal injury. But is such an isolated interpretation valid?

By way of counter argument to test this argument, if we look at Pt 3-5 in context (a contextual interpretation) we see that there *are* limits placed on the extent of a manufacturer's liability in that Part. As we have seen, s 138 deals with the liability of manufacturers for supplying goods with a safety defect that cause *injuries* to an individual. I have argued for a broad interpretation of injuries to mean any actionable wrong. However, the other sections of Pt 3-5 provide remedies within confined parameters. For example, as I discuss later in the article, s 139 provides a remedy to a third party who suffers loss or damage because of the injuries incurred under s 138. Section 140 makes a manufacturer liable if a safety defect in its goods destroys or damages other goods -- but only *of a kind ordinarily acquired for personal, domestic or household use or consumption* -- that is, the manufacturer is not liable for all loss of all goods. Similarly, under s 141 a manufacturer is only liable if land, buildings or fixtures that are *ordinarily acquired and intended to be used for private use* are damaged or destroyed because of the safety defect (emphasis added). Therefore, it might be argued that on a contextual interpretation of the section, bearing in mind the limits to a manufacturer's liability under the other sections within Pt 3-5, the word injuries in s 138 should also be limited to 'personal injuries' and not all loss because the other sections within Pt 3-5 set the confines of s 138 in context. It might then be argued that if 'injuries' is interpreted broadly, there is no need for ss 140-141. This would be a valid counter argument to my proposed reading of s 138 if the purpose of Pt 3-5 was similarly confined. However, if my argument is correct and 'injuries' in s 138 does cover all loss or damage suffered by an individual as I argue, then ss 140-141 may well be redundant. That may simply be a consequence of the effect of s 138. In *Re Bolton; Ex parte Beane*, Mason CJ, Wilson and Dawson JJ stated that:

> The words of a Minister must not be substituted for the text of the law ... It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the ... function of the court is to give effect to the will of Parliament as expressed in the law.[33]

In support of my argument on this point, s 15AA of the Acts Interpretation Act requires us to look, not at the context first, but to the purpose of Pt 3-5. As discussed, on an interpretation that considers the *purpose* of Pt 3-5, it is clear that it is intended to cover all loss suffered by individuals because of a safety defect in the goods supplied by the manufacturer. There is no qualification of the word 'loss' used in the long title to the 1992 Amending Act. It is not limited to loss in the form of personal injury and property damage for instance. In that context, it would still be consistent with the purpose of Pt 3-5 if we interpret 'injuries' in s 138 to mean 'an actionable wrong'.

4.3 Extrinsic material to confirm the meaning

If, as I have argued, we presume that Parliament intended to use the word 'injuries' instead of 'personal injury', and we accept that we must use the legal meaning of injuries to mean 'actionable wrong' and we interpret s 138 with the purpose of the Part as a whole in contemplation, a clear meaning to s 138 does become apparent. The section should be read to mean, a manufacturer is liable if an individual suffers injuries (read broadly to mean an actionable wrong) because of a safety defect in goods supplied by the manufacturer. Section 138 then has a much broader application than if 'injuries' meant mere 'personal injury'.

If the interpretation I propose is the accepted interpretation, then under s 15AB of the Acts Interpretation Act we can use extrinsic material such as the second reading speech and the Explanatory Memorandum to the 1992 Amending Act only to '*confirm* that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act'.[34] When we look at the extrinsic materials, the broad purpose is confirmed, or at least, not negated. As we have seen, according to the second-reading speech for the 1992 Amending Act, Parliament's intention was to protect consumers who were *injured* by defective goods. There is no qualification on the word injured. We run into the same interpretation problem here. In fact, if we take the legal meaning of 'injured' again, the broad purpose is confirmed. The extrinsic materials give us no contrary meaning that might limit a broad interpretation of 'injuries' in s 138. After having arrived at this conclusion, we look to the case law to see if there is any precedent precluding such a broad interpretation.

5 Case law

The case law on breaches of s 75AD of the TPA and its equivalent, s 138 of the ACL, deal with claims for what could be classified as 'personal injury'.[35] The cases involve injuries such as hepatitis A,[36] severe burns to the face,[37] injury sustained in a collision between a semi-trailer and a car,[38] and myocardial infarction.[39] These cases might, on their face, indicate that the courts have accepted that 'injuries' mean 'personal injuries'. All the injuries are within the parameters of 'personal injury'. However, they are also all safely within the broader parameters of 'actionable wrong'. It could therefore be argued that the limit of the section has not yet been reached and that it is open for plaintiffs under s 138 to claim for any actionable wrong caused by defects in the manufacturer's products. This alternative argument is open if my argument regarding the statutory interpretation of 'injuries' is accepted.

One case that, at first reading, seems to limit the term 'injuries' to mean 'personal injury' is *Bright v Femcare Ltd*.[40] In that case, women who had received a sterilising procedure using the defendant's product claimed under s 75AD for 'loss or damage' that they had suffered. Justice Lehane said that that was not enough and, in somewhat guarded terminology, said that '[w]hat appears to be necessary is that there be a clear link between particular defective goods and "injury" (not loss or damage) suffered by an individual (see *Stegenga v J Corp Pty Ltd* (1999) ATPR 41-695)'.[41]

Stegenga v J Corp Pty Ltd was a WA District Court decision. Judge Deane in that case linked the reference to individuals and injury in s 75AD and said 'in that context, in my view, the reference to "injury" means "personal injury"'.[42] This attempt at contextual interpretation does not set broad enough contextual or purposive parameters to clearly define 'injuries' and Judge Deane did not elaborate on the point. It is far from certain that that approach is the correct one to take when interpreting s 138 and it was certainly not one which Lehane J was bound to follow. I argue that *Femcare* can and should be overruled on this point.

While the decided cases appear to be based on claims for what could be called personal injuries, it remains arguable that if 'injuries' is given a wider meaning than merely personal injuries then a claim for any actionable wrong may be open to a plaintiff under s 138. Indeed, the claims involving personal injuries in the decided cases may be merely a subset of those that are available to plaintiffs using that section. I now move on to discuss a separate anomaly in s 139 ACL.

6 Loss or Damage (or Injury) s 139

6.1 Section 75AE of the TPA and s 139 of the ACL -- 'loss' becomes 'loss or damage'

As discussed, s 75AE of the TPA used only to refer to 'loss' suffered by a person because of injuries suffered by another person. It was enacted to cover loss of financial support and services suffered as a result of the other person's injuries.[43] It appears to have been underused.[44]

On 1 January 2011, s 75AE was re-enacted as s 139 of the ACL. It now allows a third party to claim not only for 'loss' but for *loss or damage* suffered by them.[45] Section 139 ACL is as follows:

> 1 A manufacturer of goods is liable to compensate a person if:
>
> (a) the manufacturer supplies the goods in trade or commerce; and
> (b) the goods have a safety defect; and
> (c) an individual (other than the person) suffers injuries because of the safety defect; and
> (d) the person suffers loss or damage because of:

(i) the injuries; or
(ii) if the individual dies because of the injuries -- the individual's death; and

(e) the loss or damage does not come about because of a business or professional relationship between the person and the individual.

2 The person may recover, by action against the manufacturer, the amount of the loss or damage suffered by the person.

This seemingly innocuous change from 'loss' only in s 75AE of the TPA to 'loss or damage' in s 139 of the ACL carries with it some serious consequences -- unintended as they may be. Even before this amendment was made, Boyd suggested that s 75AE of the TPA may be 'wider in scope' than the mental harm provisions of the Civil Liability Acts and suggested that 'it may be a reason for a plaintiff suffering from mental harm to commence proceedings under the TPA as opposed to negligence'.[46] Boyd's article referred to the state of affairs when s 75AE of the TPA referred only to 'loss'. He stated that further discussion was outside the scope of his paper but it is now worthwhile pursuing this argument. Now that s 139 covers plaintiffs who suffer 'loss *or damage*' (emphasis added) it is important to now ask -- what is the loss or damage for which a person can recover under s 139? I argue that s 139 of the ACL can now be used to claim for a wide range of loss, damage or injury including economic loss and personal injury suffered (including psychological injury).

To adequately interpret s 139, it is now necessary to understand the term 'loss or damage' as used in the section. Section 13 of the ACL states that, '[i]n [the ACL] ... a reference to loss or damage ... includes a reference to injury'. This section is the ACL equivalent of s 4K of the CCA. Because s 75AE referred only to 'loss' suffered, s 4K did not apply to or affect s 75AE. That has now changed in relation to s 139.

The effect of s 13 is to expand the possible damages claims available to plaintiffs under s 139. I concentrate on possible claims for psychological injury under s 139 but, a claim under s 139 would arguably also include claims for all forms of economic loss suffered by a third party caused by the injuries to another individual.

In *Pritchard v Racecage Pty Ltd*[47] Branson J (with whom Olney J and Spender J agreed) discussed the definition of 'injury' in s 4K of the TPA. Her Honour considered the ordinary meaning of 'injury' and quoted the *Macquarie Dictionary* definition of the word which extended to 'harm of any kind done or sustained'.[48] Her Honour said that 'in such meaning it plainly includes bodily or personal injury and extends to other forms of harm. As a legal expression "injury", connotes an actionable wrong'.[49] However, her Honour stated that 'the word "injury" in s 4K of the TP Act is intended to take on its ordinary meaning and not a strict legal meaning'.[50] Her Honour did not pursue the issue any further in that case. The High Court, however, has subsequently taken up the argument.

6.2 *Marks v GIO Australia Holdings Ltd*

Marks v GIO Australia Holdings Ltd[51] involved a claim for loss of expectation damages flowing from a breach of former s 52. This was a rare six Judge decision of the High Court. In it, the court considered the operation of s 4K when it interpreted a claim for 'loss or damage' under ss 82 and 87 of the TPA. Justices McHugh, Hayne and Callinan in a joint judgment left open a broad interpretation of 'injury' as used in s 4K. They said 'the loss or damage spoken of in ss 82 and 87 is not confined to economic loss. Section 4K makes that clear'.[52] Their Honours then elaborated on that expanded meaning:

> [Section 82] contains no stated limitation of the kinds of loss or damage that may be recovered and contains no express indication that some kinds of loss or damage are to be regarded as too remote to be recovered. Indeed, s 4K may be seen as expanding the kinds of loss or damage that are dealt with in s 82 (and elsewhere in the Act) by its provisions.[53]

They did however limit its application when they rejected the plaintiff's claim for loss of expectation damages by stating:

> It may be that injury in s 4K is intended to refer to injury to the person but we do not need to decide if that is so. Even if injury is to be given some wider meaning than personal injury, we do not accept that a person suffers injury simply because a hoped for advantage does not materialise.[54]

Their Honours, too, looked to the purpose of the Act to interpret the section. They stated that:

> In reaching the conclusion that we do, we are mindful that the object of the Act is said to be 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (s 2).No narrow construction of the Act should be adopted. But neither should the words of the Act be stretched beyond their limit.[55]

According to three justices then, 'loss or damage' is not confined to economic loss and, once injury is implied under s 4K, may well mean something more than personal injury -- but, by implication, according to the three justices, it at least *includes* economic loss and personal injury. The other three justices went further.

Justice Gummow was prepared to allow a still broader interpretation of 'injury' in s 4K based upon an analysis of the common law usage of the term.[56] He stated:

> It was suggested in argument that s 4K was concerned with the inclusion of damages for personal injury ... There is nothing in its text to indicate that 'injury' is so confined. Section 4K performs quite a different function in disentangling the various elements compounded in the concise language of s 82. 'Injury' is used in s 4K in the sense of 'actionable wrong'.[57]

His Honour then framed the measure of damages prescribed in s 82 (s 236 of the ACL) in terms, not of 'loss or damage' but of 'injury', the more applicable term in the circumstances. The word injury is not used in s 82 but is, as Gummow J states, imported into that section.

Justice Gaudron did not address s 4K directly but stated that she was 'in substantial agreement with the approach taken by Gummow J'[58] in reaching his conclusion.

Justice Kirby, while dissenting on the ultimate decision, was in step with Gaudron and Gummow JJ on this point that 'loss or damage' when used throughout the TPA took on a much broader meaning with the inclusion of 'injury' as required under s 4K. His Honour was prepared to expand the reference to injury even further than the majority to include the 'deprivation of the expectation of profits' caused by a breach of s 52. His honour stated:

> There is a further textual consideration. I have already mentioned that s 4K of the TP Act extends the definition of 'loss or damage' throughout the Act to include 'a reference to injury'. In effect, this means that wherever 'loss or damage' appears in the TP Act, one can add the words 'or injury'. The precise differentiation between 'loss', 'damage' and 'injury' is not made clear. There is no authority on the point. But it is plain that the legislature has provided for the widest possible definition of adverse consequences flowing from ('by') conduct in contravention of provisions of the TP Act. Clearly, therefore, by adding the words 'damage' and 'injury', the parliament had a purpose to stress the notion of harm beyond any narrow concept of 'loss'. This is a further reason for rejecting the argument of GIO that, inherent in the idea of 'loss or damage' was a detriment falling short of the damage consequent upon the deprivation of the expectation of profits which would have accrued if the contravention of a relevant provision of the TP Act had not occurred.[59]

This left three justices who were prepared to leave open a broad interpretation of injury that includes personal injury and economic loss and three who elaborated on a much broader interpretation of s 4K. Because, under s 139, a plaintiff can claim for 'loss or damage' and not just loss, and s 13 of the ACL is a replica of s 4K of the CCA, the High Court's interpretation, has, since 2011, applied equally to the 'loss or damage' suffered by a person under s 139 of the ACL.

6.3 Extension of loss or damage to include psychological injury

Because he referred to s 75AE and not the amended s 139, Boyd's contention was necessarily understated. Now, the loss or damage suffered by the third party required under s 139 includes 'injury' in its widest sense as discussed by the High Court in *Marks* and therefore should give plaintiffs a broad remit to claim not just for simple loss (loss of financial support etc) but for any loss or damage (or injury) suffered.

By way of example of how s 139 might work now, if the partner of the lawn mower operator referred to earlier sees his or her partner injured and suffers psychological injury because of seeing the partner so injured, then he or she would be entitled to claim against the manufacturer for the psychological injury as 'loss or damage' suffered under s 139. It is also equally arguable that if her expensive clothing was ruined by blood, she could claim against the manufacturer for the cost of the clothing. No loss or damage or injury, it seems from *Marks*, is too remote.

6.4 Limitation of damages under Pt VIB

Of course, the personal injury damages claimable under ss 138 and 139 would still be limited under Pt VIB of the CCA. However, where a claim for psychological injury in negligence might be limited under, for example, Pt 3 of the Civil Liability Act 2002 (NSW), it may not be so limited under s 139.[60] This is because personal injury damages is defined

in s 87D of the CCA to mean 'damages or compensation for loss or damage that is, or results from, the death of or personal injury to a person'. It is arguable that those aspects of a plaintiff's claim that are 'loss or damage' (or injury) in its broadest sense and are not characterised as 'personal injury damages' would not be so confined. A more detailed discussion of this topic is outside the scope of this paper.

7 Conclusion

One of the aims of the ACL was to instil 'greater confidence in dealing with businesses due to more consistent laws and ... greater consistency in the enforcement of these laws'.[61] Part 3-5 of the ACL relates to liability of manufacturers for safety defects in the goods they supply. This article shows that analysing the terms even within one small part of the ACL is fraught with detail and reliant on detailed statutory interpretation.

In 2009, when the Commonwealth Government was contemplating the necessary amendments for the TPA to become the CCA, it had the opportunity to amend the Act to clarify ambiguities that had crept into the Act since its inception in 1974. The word 'injuries' as used in ss 138 and 139 sits in stark contrast to the clear definitions given to 'personal injury' in ss 4 and 130 of the CCA and 'serious injury or illness' in the ACL itself. It can also be contrasted with the word 'injury' used in other Parts of the ACL.[62] If we take a purposive approach to the interpretation of the term 'injuries' used in s 138, the scope of the section becomes much broader. Section 138 is no longer confined to personal injuries caused by manufacturer's defective products but to a much broader range of actionable wrongs so caused. A review of the case law on the topic does not preclude this broad interpretation.

The amendment to s 139 is, on one analysis, much more obvious and potent. The change from 'loss' in s 75AE of the TPA to 'loss or damage' in s 139 of the ACL carries with it a much broader application and may have opened a Pandora's box. The range of claims available for plaintiffs claiming under s 139 for loss or damage (or injury) will include claims for personal injury (including psychological injury) and economic loss that they suffer.

These points are at least arguable. If my interpretation of s 138 is wrong, and it is meant to be limited to cases of personal injury, then Parliament should amend the section to make it clear that it applies to personal injury only. A definition of personal injury similar to that contained in ss 4 and 130 of the CCA could be inserted into s 2 of the ACL; then ss 138 and 139 could be amended to refer to 'personal injury' instead of 'injuries'. This would suitably confine the scope of s 138 and make its meaning clear. Similarly, if s 139 is meant to be limited to claims for financial support and services, the term 'loss or damage' should be replaced with a more appropriate term.

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1 See G G Howells, 'The New Product Liability Law: The Relevance of European and United Kingdom Reforms for the Development of the Australian Law' (1996) 4 *CCLJ* 1; M Hammond, 'The Defect Test in Part VA of the Trade Practices Act 1974 (Cth): Defectively Designed?' (1998) 6 *TLJ* 1; D Harland, 'Product Liability Under Pt VA of the Trade Practices Act' (2001) 9 *CCLJ* 1; J Kellam and L Nottage, 'Happy 15th Birthday, Part VA TPA! Australia's Product Liability Morass' (2007) 15 *CCLJ* 26; C Newman-Martin, 'Manufacturers' Liability for Discoverable Design Flaws in Prescription Drugs: A Merck-Y Area of the Law' (2011) 19 *TLJ* 26; J Kellam, L Nottage and M Glavac, 'Theories of Product Liability and the Australian Consumer Law' (2013) 21 *CCLJ* 1.

2 (1998) 196 CLR 494; 158 ALR 333; [1998] HCA 69; BC9805922 (*Marks*).

3 Such claims have been limited under Pt VIB of the CCA. See my later discussion of the interaction of the CCA and the various state Civil Liability Acts at 6.4.

4 To date, claims under s 75AE (and s 139) have been limited and largely based upon a technicality caused by the wording of the section, a technicality which has since been clarified by the courts. See *Stegenga v J Corp Pty Ltd* (1999) ATPR 41-695; (1999) ASAL 55-025; *Cheong v Wong* (2001) 34 MVR 359; [2001] NSWSC 881; BC200106190 at [87]; *Erwin v Iveco Trucks Australia Ltd* (2010) 267 ALR 752; 55 MVR 452; [2010] NSWCA 113; BC201003146 at [121]-[130].

5 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2), 2010, para [12.1] states that '[t]he manufacturers' liability provisions in the Bill continue the operation of the current Part VA of the TP Act. However the drafting of the provisions has been amended to reflect the drafting style used for other provisions of the ACL'.

6 Ibid.

7 Trade Practices Amendment Act 1992 (Cth).

8 *Directive 85/374/EEC of the European Parliament and of the Council of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products.*

9 Commonwealth, *Parliamentary Debates*, Senate, 26 May 1992, (Michael Tate).

10 Ibid.

11 Explanatory Memorandum, Trade Practices Amendment Bill 1992, p 9 (emphasis added).

12 The ACL is set out in Sch 2 to the Competition and Consumer Act 2010 (Cth). It derives its power as a law of the Commonwealth from s 131(1) of the CCA. The ACL has its own definitions section and only some of the definitions in the CCA apply to the ACL. The definition of 'personal injury' in s 4 does not apply to the ACL -- see s 4KA of the CCA. Similarly, the definition of 'personal injury' in Pt XI of the CCA only applies to that Part.

13 Harland, above n 1, at 3.

14 Ibid, at 3-4.

15 Ibid, at 6.

16 Kellam and Nottage, above n 1, at 64.

17 Kellam, Nottage and Glavac, above n 1, at 80.

18 (2000) 99 FCR 548; (2000) ATPR 41-767; [2000] FCA 677; BC200002707 (*Pasminco*).

19 Ibid, at [20].

20 The injuries alleged in the subsequent Victorian Supreme Court claim were described as lead poisoning, bowel problems, respiratory problems, sleep deprivation and brain damage -- all safely under the personal injury umbrella.

21 (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54; BC200207277 (*Graham Barclay*).

22 Ibid, at [94]-[97].

23 (1997) 72 FCR 203; 142 ALR 527; 25 MVR 17; BC9700167.

24 D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butteworths, 2011, p 119 (Pearce and Geddes); see also A MacAdam and T Smith, *Statutes*, 3rd ed, Butterworths, 1993, p 211 -- 'where within the one Act the same word could have been used, but instead a different word has been used, the [rebuttable] presumption is that a different meaning is intended.'

25 See *Cox v Journeaux (No 2)* (1935) 52 CLR 713 at 721. The relevant issue was whether, under s 63 of the Bankruptcy Act 1924, 'any bankrupt may continue, in his own name and for his own benefit, any action or proceedings commenced by him previous to his bankruptcy for any *personal injury* or wrong done to himself or to any member of his family.' Dixon J stated that the test was 'whether the damages ... were to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property.'

26 See n 12 for an explanation of the interaction between the CCA and the ACL.

27 In relation to s 4, see s 4KA. In relation to s 130, the definitions in that section are confined by the introductory words 'In this part ...'.

28 See Pearce and Geddes, above n 24, pp 127-8 and O'Connor J when considering the use of the word 'trade mark' in *Attorney-General (NSW) v Brewery Employés' Union of New South Wales* (1908) 6 CLR 469 at 531. Cf Priestley JA in *Gamer's Motor Centre (Newcastle) Pty Ltd v NatWest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475 at 483 who said '[t]he object of the approach is not to find the legal as opposed to the "ordinary" meaning, but to find from the range of legal and ordinary meanings, which in any event will seldom be in watertight compartments, the meanings best suited to the statutory document as a whole.'

29 (1998) 196 CLR 494; 158 ALR 333; [1998] HCA 69; BC9805922 at [93].

30 Pearce and Geddes, above n 24, p 34.

31 CCA s 2.

32 Pearce and Geddes, above n 24, p 119.

33 (1987) 162 CLR 514 at 518; 70 ALR 225; [1987] HCA 12; BC8701765.

34 Acts Interpretation Act s 15AB(1)(a). Section 15AB(1)(b) only applies if the provision is ambiguous or obscure (subs (1)(b)(i)) or if the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable (subs (1)(b)(ii)). Neither of these applies to the interpretation I propose.

35 See App A to Kellam and Nottage, n 1, at 71.

36 *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540; 194 ALR 337; [2002] HCA 54; BC200207277.

37 *Glendale Chemical Products Pty Ltd v ACCC* (1998) 90 FCR 40; (1998) ASAL 55-021; (1999) ATPR 41-672; BC9806620.

38 *Middleton v Erwin* (2009) 52 MVR 218; [2009] NSWSC 108; BC200901191.

39 *Peterson v Merck Sharpe and Dohme (Aust) Pty Ltd* (2010) 184 FCR 1; 266 ALR 1; [2010] FCA 180; BC201001051.

40 (2000) 175 ALR 50; [2000] FCA 742; BC200002938 (*Femcare*).

41 Ibid, at [92].

42 *Stegenga v J Corp Pty Ltd* (1999) ATPR 41-695; (1999) ASAL 55-025 at 42,884.

43 Explanatory Memorandum, Trade Practice Amendment Bill 1992, at [33] states:

> The dependants of a person who is injured or dies because of defective goods may also suffer their own loss as a result of that person's injuries or death. Section 75AE provides such persons with a right to take a separate action to recover such loss, as 'Lord Campbell' type actions compensate only in limited circumstances.

Lord Campbell Act actions were designed to provide recompense for the loss of financial support from and loss of services provided to relatives of a deceased or injured person.

44 Its main use to date seems to have been in claims for indemnity by tortfeasors against manufacturers -- claims which have been roundly rejected as a proper use for the section. See *Cheong v Wong* (2001) 34 MVR 359; [2001] NSWSC 881; BC200106190 at [87]; *Stegenga v J Corp Pty Ltd* (1999) ATPR 41-695; (1999) ASAL 55-025; *Erwin v Iveco Trucks Australia Ltd* (2010) 267 ALR 752; 55 MVR 452; [2010] NSWCA 113; BC201003146 at [121]-[130].

45 A change made 'to reflect the drafting style used for other provisions of the ACL'. See text to n 7 above.

46 G Boyd, 'Personal Injuries Law Reform: An Unintended Effect on Product Liability Claims?' (2003) 11 *TLJ* 1 at 16. Compare the limitations on a claim for Mental Harm under Pt 3 of the Civil Liability Act 2002 (NSW).

47 (1997) 72 FCR 203; 142 ALR 527; 25 MVR 17; BC9700167 (*Pritchard*).

48 Ibid, at FCR 217 at [B]; ALR 539.

49 Ibid.

50 Ibid, FCR 217 at [F]; ALR 540.

51 (1998) 196 CLR 494; 158 ALR 333; 73 ALJR 12; BC9805922.

52 Ibid, at CLR 513 at [46].

53 Ibid, at CLR 509 at [34].

54 Ibid, at CLR 515 at [53].

55 Ibid, at CLR 515 at [56].

56 Ibid, at [93], quoting from *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442; where Viscount Simon LC said: '"injury" is limited to actionable wrong, while "damage", in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not.'

57 Ibid, at CLR 526 at [93].

58 Ibid, at CLR 504 at [18].

59 Ibid, at CLR 547 at [149].

60 On the primacy of a claim under the TPA (and therefore the CCA) see the recent decision of Beech-Jones J in *Nair-Smith v Perisher Blue Pty Ltd (No 2)* [2013] NSWSC 1463; BC201313566 at [12]; and *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 303 ALR 583;279 FLR 202; [2013] NSWCA 361; BC201314139.

61 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010, p 12.

62 See the requirement for consumer goods or product related services to cause 'injury' in Pt 3-3 of the ACL.